A One-Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency

David Kenny* and Conor Casey**

Introduction

In many legal systems, the political branches play an important role in assessing the compatibility of legislation with constitutional commitments. They do so through engaging in pre-enactment, political review of constitutionality,[1] where the executive and/or legislative branch assess the interaction of proposed legislation or policy with constitutional commitments.[2] Often called 'political constitutionalism', this pre-enactment review has several supposed advantages: fostering greater rights consciousness and scrutiny amongst the political branches; avoiding the pitfalls of relying (solely) on judicial review; increasing democratic engagement on the content and scope of rights and values; and fostering inter-branch collaboration.[3] Recent scholarship on political constitutionalism has primarily focused on a handful of jurisdictions associated with Westminster-style systems like Canada, the United Kingdom, and New Zealand.

An interesting but less-examined facet of political constitutionalism is its diversity as a public law tradition. Many jurisdictions, including France, Ireland, and Japan have developed lesser-explored forms of pre-enactment constitutional review long before political constitutionalism received prominent attention in public law scholarship.[4] Pre-enactment review in Ireland by the office of the Attorney General (AG), which developed informally alongside strong-form judicial review, is hugely influential. Surprisingly, there is little sustained domestic analysis of the AG in Ireland, either in

* Assistant Professor, Trinity College, Dublin, School of Law.
** PhD Candidate, Trinity College, Dublin, School of Law.
1 Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model' (2006) 69 Modern Law Review 7.
2 Hiebert (n 1) 12.
3 See Stephen Gardbaum, *New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013).
4 See David Kenny and Conor Casey, 'Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan' (2020) International Journal of Constitutional Law (forthcoming).

academia or public discourse.[5] There is a mismatch between the importance of the AG to the Irish legal system on the one hand and the level of critical analysis it has received on the other.

This article seeks to begin renewed consideration of these issues. While there is much more that might be done, including interviews with key staff members and stakeholders, the first step is to map these problems as best we can and to formulate questions to guide later work. This article therefore provides a critical analysis of the operation of the AG's office and its important impact on the Irish constitutional order based on what information is available.

The AG fulfils several important functions, both constitutional and statutory. Many of these present interesting points for academic study, including the conflict between the roles of government legal advisor and an independent 'Guardian of the Constitution' and enforcer of public rights; the prosecutorial function of the office now delegated to the DPP; its role in extradition; and its role in relator actions.[6] But here we focus on what we consider the AG's most important function, and the one that is not well-scrutinised in the academic literature: the position of constitutional and legal advisor to the government and executive departments on formation of policy. For reasons described herein, the account is necessarily an imperfect one: there are simply too many aspects of this process that are shrouded in secrecy. This itself illustrates the most pressing difficulty with the role and influence of the AG: we cannot fully know it based on the limited information we have.

Part I outlines the functions and structure of the AG's office, and the process through which legal advice is provided; the substantive norms underpinning review by the AG; and the secrecy in which these norms are shrouded. Part II describes the impact of the system of AG's advice on the policy-making process, illustrating recent instances where the AG's advice has seemingly had the effect of vetoing policy-

[5] With the very notable exception of James Casey's landmark work on the AG. See James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (Round Hall 1996).
[6] See, for an overview of all these functions, Gerard Hogan, Gerard Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [5.4.01]–[5.4.72].

making. We also interrogate two core assumptions about the system of AG's advice – that the office is independent of government, and that the government is bound by the advice. In Part III, we examine the effect of this system of advice on the political and policy-making process, arguing that it disempowers the Oireachtas and the people and fails to create a culture of political constitutionalism; that it empowers the executive and its dominance of the political system at least as much as it restrains it; and that it might undermine aspects of the institution of judicial review. In Part IV, we argue for transparency in the form of partial publication of AG's constitutional advice. This is necessary, desirable, and constitutionally permissible, and would enable public and academic discourse about its role, creating accountability for government and the AG's office, and fostering meaningful political constitutionalism.

Part I: The Attorney General's Office and the Provision of Constitutional Advice

Background and Structure

The AG is an office in many common law systems with shared roots in English history.[7] It has constitutional status in Ireland by virtue of Article 30 of the Irish Constitution, which provides that the AG is 'the adviser of the Government in matters of law and legal opinion' and is to perform this function, and any others provided for by law, including representation of the public in litigation and defence of public rights.[8] The Constitution also makes the AG responsible for prosecution of crimes in the name of the People, but this has been delegated by law to a dedicated Director of Public Prosecutions.[9]

The AG is the legal adviser of the government, and not the Oireachtas[10] or the president.[11] At the same time, the AG operates with a degree of formal independence from government. The Constitution expressly states that the AG 'shall not be a

[7] See generally J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell London 1984).
[8] See Art 30.1 and 30.4, Constitution of Ireland; Prosecution of Offences Act 1974. See generally Casey (n 5).
[9] See Hogan et al (n 6) [5.4.12]–[5.4.40].
[10] Declan Costello, 'Reviews and Notices' (1985) 20(1) Irish Jurist 223, 224.
[11] David Gwynn Morgan, 'Mary Robinson's Presidency: Relations with the Government' (1999) 34 Irish Jurist 256, 259. Morgan notes that President Mary Robinson had occasion to seek advice from the then chairman of the Bar Council Frank Clarke SC (now Chief Justice) on when the presidential prerogative to refuse a dissolution of the Dáil could be exercised. It was accepted that the president could not, and should not, seek such advice from the Attorney General.

member of the Government'.[12] In a break from the Westminster tradition, the AG is not generally a member of the Oireachtas.[13] However, the AG has a very close relationship with the government, being appointed by and serving at the pleasure of the Taoiseach,[14] and (unlike in the UK) sitting in cabinet meetings.[15]

The AG has almost always been a lawyer of eminence and long standing that was a member of, or has some political affiliation with, one of the parties in government.[16] Many who serve as AG go on to serve as senior judges[17] and several have gone on to become Chief Justice.[18] During the term of his office, the AG is given precedence before all other barristers in the State.[19] The AG is called – informally or unofficially – the 'Leader of the Bar'.[20] The office carries considerable prestige in Irish legal and political circles.

The size and complexity of modern government has put increased demand on the capacity of the AG, who has thus maintained a staff of civil servant lawyers to support him or her in his role. The office of the Attorney General includes three parts, which the AG oversees and directs. Legislative drafting is carried out by the Office of Parliamentary Counsel. The Chief State Solicitor's Office (CSSO) *inter alia* manages various matters concerning litigation. The main functions of the office, however, are performed by the Advisory Counsel, which is responsible for the provision of legal advice and oversees the most important cases (particularly constitutional cases) to

---

[12] Art 30.1.

[13] The Attorney General can be, and occasionally has been, a member of the lower House of Parliament (eg JM Kelly and Declan Costello), but the general tendency has been for appointees to be a practising Senior Counsel at the time of appointment. Some Attorneys General were also prominent political figures after their appointment, including John Costello and Michael McDowell. See s 6 of the Ministers and Secretaries Act 1924.

[14] He or she is formally appointed by the President, but the nomination is made by the Taoiseach, and the President has no discretion to refuse to make the appointment.

[15] Indeed, the AG holds a prized seat at the cabinet table, very close to the Taoiseach. Eoin O'Malley, 'The Apex of Government: Cabinet and Taoiseach in Operation' in Eoin O'Malley and Muiris MacCarthaigh (eds), *Governing Ireland: From Cabinet Government to Delegated Governance* (Institute of Public Administration 2012) 49. The close relationship between the AG and government, particularly the Taoiseach, is also reflected in their physical proximity: the AGO is adjacent to the Taoiseach's Office on Merrion Street.

[16] By convention (but not by law), the AG refrains from engaging in private practice while holding the office: Casey (n 5) 305.

[17] Harry McGee, 'Majority of State's Attorneys General Were Appointed Judges' *The Irish Times* (Dublin, 20 June 2017).

[18] Namely Hugh Kennedy CJ, Maguire CJ, Cearbhall ÓDálaigh CJ and John Murray CJ.

[19] Hugh Geoghegan, 'The Relationship of the Attorney General to Bar and Bench' in Blathna Ruane, Jim O'Callaghan and David Barniville (eds), *Law and Government: A Tribute to Rory Brady* (Round Hall 2014) 67.

[20] Ruane et al (n 18) 69.

which the State is a party.[21] The office has expanded considerably over the years. At the foundation of the State the AG had one legal assistant. By 1995 the office was staffed by a little over two dozen lawyers. As of 2016, the staff complement of the AG's office across all three parts totalled around 380 lawyers and support staff.[22]

The AG acts as a centralised provider of legal advice for the cabinet, all government departments, and some core state agencies. The AG advises not only on issues of constitutionality, but on international instruments, EU law, and questions of domestic criminal law, commercial law, etc. As a result, it is 'required to advise on a daily basis on a whole spectrum of issues associated with the public administration of the State which elsewhere might not be referred to the government's principal adviser'.[23] An unusual feature of the Irish system – possibly due to the relatively small scale of the country – is a high reliance on this centralised source of legal advice rather than on internal legal advisers within agencies or departments.[24]

The advisory side of the office has five constituent groups, each focused on a set of specialised legal topics.[25] Each group tends to contain between six to eight lawyers who specialise in the area to which they are assigned and are of varying levels of seniority.[26] The office as a whole is overseen by a Director, who is also the most senior member of the Advisory branch. The staff of the office are all ultimately answerable to the AG. The office is staffed by Advisory Counsel, civil servants who were former practising barrister or solicitors. As civil servants, Advisory Counsel serve across administrations and are not recruited on the basis of ideological affinity with the incumbent government.

---

[21] E Sullivan, *Review of the Attorney General Report* (2006) <https://www.gov.ie/en/organisation/department-of-the-taoiseach/> accessed 26 February 2019.
[22] Advisory and parliamentary counsel numbered around 137 and the CSSO around 243. Office of the Attorney General, *Annual Report* (2016) 10.
[23] Costello (n 10) 223–25.
[24] Some of the bigger departments have internal legal advisors that provide more routine advice, and liaise with the Attorney General's Office for more important points of law. Advisory counsel may be seconded to departments or agencies from time to time.
[25] See Sullivan (n 21). However, there are various heterogeneous subjects within these areas. Forestry and freedom of information fall within a single group, and each group would have ten or more areas – of varying complexity, scope, and importance – to deal with.
[26] See <http://www.attorneygeneral.ie/ac/ac_org.html> accessed 26 February 2019.

Procedures Governing Provision of Executive Advice

Any policy proposal generated by government begins with a consulting by the relevant Minister or Department of the Taoiseach's office and the Department of Finance. Should the policy contain 'any substantive constitutional or legal dimension', the AG's office must also be consulted.[27] The current AG has described the office as a hub where almost everything of major governmental importance passes through.[28] If full legal advice is required from the AG, this is acquired and considered before a formal policy memo is circulated to government. If this advice is not obtained, any policy proposal to government may be withdrawn by the Taoiseach in consultation with the AG.[29] In this way, the AGO is intimately involved in the formulation of policy from its inception, and no policy with major legal or constitutional dimensions can take shape without its guidance. The office continues to provide advice throughout policy formation, legislative drafting, and the passage of legislation through the Oireachtas.

Ireland, even by the standards of Westminster parliamentary systems, is typically characterised by a high level of executive dominance in the law-making process. Unless there is a minority government, almost no laws are passed other than those originating from government, and government will exercise strict control over changes made in the Oireachtas.[30] In the ordinary course of things, then, all policy-making and law-making is subject to the influence of the AG.[31]

The manner in which this advice on constitutional questions is settled on is not very clear, as the workings of the AG's office are not publicly disclosed and its processes are relatively secret. However, we can infer some of the office's internal procedures from the limited publicly available materials produced by the AG's office, and certain other sources.

---

[27] Sullivan (n 21) 32.
[28] Anne Marie-Hardiman, 'The Lawyer at the Centre' (2017) 22(5) The Bar Review 124–26.
[29] Sullivan (n 21) 32.
[30] See Lia O'Hegarty, 'The Constitutional Parameters of the Work of the Houses of the Oireachtas' in Muiris MacCarthaigh and Maurice Manning (eds), *The Houses of the Oireachtas: Parliament in Ireland* (Institute of Public Administration 2010) 103.
[31] See Hogan et al (n 6) [4.3.81]; Eoin Daly and David Kenny, 'Government Blocking of Legislation Is Constitutionally Dubious' *The Irish Times* (Dublin, 14 June 2019).

A permanent Advisory Counsel (under oversight of senior Advisory Counsel staff) responds to any request for constitutional advice by researching the issues raised. This assists the AG in preparation of official legal advice.[32] Guidelines issued by the AG's office require that requests for advice be as specific and precise as possible.[33] Requests must also refer to previous advice offered by the office where appropriate. This process might also involve liaising with the in-house legal advisors of a department.[34] It is also known that prominent barristers in private practice are regularly tasked with writing opinions and give detailed advice where required to deal with a particularly challenging or major points of law.[35] Timelines for the provision of advice are often very tight, and this means formal inputs are not always made at every level of the AGO's hierarchy.[36] Any matter that is 'legally significant or novel, politically important, sensitive or financially valuable'[37] must be brought directly to the attention of the AG.

How the AG presents advice to cabinet is not officially disclosed; it appears that it varies. The background legal advice, either from internal Advisory Counsel or external barristers, is preparatory and not final material. The AG will consider this work and, in consultation with advisors, prepare final, official advice for government. The presentation of the advice may come via incorporation into a memorandum or policy proposal that comes before cabinet from another source.[38] On particularly complex or important matters, advice may be given at the cabinet table *viva voce*.[39] With major constitutional questions, it is common that the AG would prepare for the cabinet a formal memorandum setting out the relevant legal advice in detail, though the precise length and level of detail will vary with different issues and different AGs/governments.[40]

---

[32] Sullivan (n 21) 8.
[33] Department of the Taoiseach, *Cabinet Handbook* (2006) Appendix II 59–60.
[34] Casey (n 5) 139.
[35] The Office has panels of barristers that are specialists in particular areas; these are often employed in litigation, but may also be asked for advice.
[36] Sullivan (n 21) 8–9.
[37] Sullivan (n 21) 21.
[38] Department of the Taoiseach (n 33) 32.
[39] Casey (n 5) 112.
[40] Casey (n 5) 112. The process of cabinet meetings is quite formal and usually strictly structured, though the individual Taoiseach 'determines to a large extent how cabinet operates': O'Malley (n 15) 49.

Substantive Norms Governing Provision of Constitutional Advice

The substantive norms underpinning executive review are shrouded in secrecy. It is unclear what standard the AG applies when assessing constitutionality. There are several conceivable approaches the AG could adopt when providing advice. The AG could attempt to approximate how a court would interpret the constitution and assess a policy against this standard. This might work in tandem with a risk-assessment approach, sanctioning a policy as constitutional based on a probabilistic assessment of the likelihood of a declaration of unconstitutional/adverse court ruling. Or, similar to the Office of Legal Counsel in the US Department of Justice, it could seek a middle ground to interpret the law in an accurate way that also protects the executive's institutional prerogatives. This could encompass encouraging a distinct interpretation of the Constitution, unique to the political branches and their expertise. Or the AG could act in a partisan way, using legal craft to offer plausible legal arguments which help uphold and implement the executive's policy choices, even if they depart from the best view of the law a more detached judicial body might reach.[41]

The intense secrecy surrounding the review process makes it impossible to conclusively deduce which approach is preferred, or if one consistent approach is adopted. It seems, however, that advice on constitutionality generally focuses on a court-mimicking,[42] probabilistic assessment – having regard to the prevailing law and outlook of the courts – of the act being invalidated as unconstitutional by the superior courts on constitutional grounds or having other constitutional issue.[43] On at least two recent occasions the AG advised on issues of considerable constitutional and political sensitivity squarely anticipating what the Court might say. On both occasions the AG was concerned above all about the 'consequences of getting it wrong'.[44] Conversely,

[41] See Cornellia T Pillard, 'The Unfulfilled Promise of the Constitution in Executive Hands' (2005) 103 Michigan Law Review 676, 685.

[42] Because of the secrecy of the Office and the unwillingness of government to publish its advice, it is impossible to rule out the possibility that particular AG's may have, in fact, take a broader approach to the role of legal adviser on constitutional issues. The most we can say is that there is no evidence available in published government papers or analysis of the AG's role that suggests this has ever been the case.

[43] See generally Casey (n 5) 110.

[44] Ruadhan Mac Cormaic, 'Where Politics and the Law Meet' *The Irish Times* (Dublin, 9 July 2013). The examples Mac Cormaic gives are Máire Whelan AG's advice that a referendum was required to ratify the 2012 fiscal treaty despite Irish diplomats' strong contention it fell below the 'Crotty test' outlined by the Supreme Court; and the AG's advice that abolishing upward-only rent reviews without compensation would be unconstitutional.

there is no available evidence that the AG tries to consider issues of constitutionality in a less tactical, broader way, or encourages the government to form independent or distinct constitutional interpretations by virtue of its institutional role. Nor is there evidence of highly partisan advice.

A court-mimicking approach is perhaps unsurprising, given that the AG has always been a practising barrister, generally advised by Advisory Counsel, who have been practising lawyers and currently practising barristers.[45] It makes sense that the advice the Attorney gives is similar to legal advice that legal practitioners would give clients anticipating litigation. Based on this advice, and any other information that the AG might provide to cabinet, the government will make decisions about what policies and enactments to pursue and not pursue.

Publication of Advice

The advice of the AG is very rarely published. Detailed reasons or written advice is not released for parliamentarians to assess and scrutinise. The advice of the AG will generally only be published if, under the 'thirty-year rule', it is included in the general publication of government papers and files several decades later. What is disclosed, when the adoption of non-adoption of a policy is notable or controversial, is the existence of the advice and its conclusion: that the AG has advised that some policy is constitutional or not.

The reason for this secrecy seems largely a matter of convention: the advice is not published because it was not generally published. While the advice can be subject of legal privilege,[46] this privilege can be waived. However, since it was not common practice to share the advice of the Attorney, a convention of non-disclosure grew up from the earliest days of the Free State and has become even stronger in recent years.[47]

[45] See Ruadhan Mac Cormaic, 'Not Unusual for some Barristers to Make €500,000 from AG's Office' *The Irish Times* (Dublin, 7 January 2014).

[46] It thus cannot be compelled to be disclosed in litigation, etc: see *SPUC v Grogan No 3* [1992] 2 IR 471.

[47] This convention was established by the first President of the Executive Council, WT Cosgrave, who refused to disclose a copy of the then AG's opinion to a public inquiry chaired by Supreme Court Judge Mr Justice Creed Meredith. Cosgrave stated he held very strongly it would be 'contrary to the public interests' and 'interests of good government in the future, to create the precedent of publishing the confidential legal advice obtained by the

As with many conventional practices, rationales develop over time that may not be accurate explications of why the conventions developed in the first instance.[48] The contemporary rationale is related to the confidentiality of cabinet meetings. In 1997, the Constitution was amended to secure and clarify the right of cabinet confidentiality, which had been practised by convention and upheld by the Supreme Court.[49] The cabinet acts collectively[50]; all actions are taken as one, and dissent and disaffection with particular choices are not aired outside the cabinet room. Discussions held at cabinet meetings are thus confidential. Since the AG's advice is heard at cabinet meetings and may influence the decisions of cabinet, the argument goes, this advice cannot be published or it would breach this confidentiality.[51]

This led, it seems, to the assertion of the government in recent years that it *could not* publish AGs' advice. The opinion of governments on the publication of the AGs' advice has clearly hardened in recent years. In 2011, for example, then Taoiseach Enda Kenny stated during a Dáil debate that he could not think of an instance where the AG's advice has been published.[52] In 2018, when publishing a short précis of the AG's advice on the wording of the abortion referendum, Taoiseach Leo Varadkar described the move as 'unprecedented'.[53] As will be discussed below, this was not unprecedented, and the position that advice should not be published is supported by neither principle nor precedent,[54] and has several negative effects. But it perhaps fits with a general inclination for government in Ireland to be, as Chubb describes it, 'cagey and secretive'.[55]

Executive Council … this being the first instance in which such a request has been made in this country… my considered opinion is that I should not create this precedent': Casey (n 5) 142–43.

[48] David Kenny, 'Conventions in Judicial Decision-Making: Epistemology and the Limits of Critical Self-Consciousness' (2015) 38(2) DULJ 432.

[49] 17th Amendment of the Constitution Act 1997.

[50] Art 28.4.2 of the Irish Constitution; Brian Farrell, '"Cagey and Secretive": Collective Responsibility, Executive Confidentiality and the Public Interest' in Ronald J Hill and Michael Marsh (eds), *Modern Irish Democracy: Essays in Honour of Basil Chubb* (Irish Academic Press 1993) 82.

[51] Casey (n 5) 142.

[52] Dáil Deb 18 May 2011, vol 732, no 4.

[53] Dáil Deb 30 January 2018, vol 964, no 4.

[54] Casey (n 5) 143.

[55] Basil Chubb, 'The Political Role of the Media in Contemporary Ireland' in Brian Farrell (ed), *Communications and Community in Ireland* (Mercier Press, 1994).

Part II: The Effect of the Attorney General on Policy-Making in Practice

The impact of the AG on the policy- and law-making process is seemingly very significant. Again, the true extent of its role is hard to know because of the secrecy of its processes and advice. What is clear is that the government relies heavily on the AG's constitutional advice to justify and explain controversial policy decisions.

Veto on Policy-Making

Governments regularly (and perhaps increasingly) rely on the advice of the AG to justify pursuing controversial policies and, in particular, *not* pursuing them.[56] There are several prominent recent examples. On almost all of these occasions, the government also refused to publish the advice, and said that it could not do so.

In 2006, the issue of same-sex marriage was gaining traction and the government's position on reform became a matter of considerable controversy. The Minister for Justice of the time, Brian Lenihan, commented to media that the government could not legislate for marriage for same-sex couples as the AG advised that legislation of this sort would be unconstitutional, and a referendum would be required.[57] This position was challenged, sparking a debate amongst legal commentators: while some believed the AG's advice was correct, some argued that – since marriage was undefined in the Constitution – the Oireachtas was free to define it in legislation as including same-sex couples.[58] Despite this disagreement, the government was unwilling to consider legislative change, and a referendum was held in the lifetime of the next government.[59]

The Fine Gael–Labour coalition government (2011–2016) claimed to face very severe limitations on legislative action due to the AG's advice on constitutional property

[56] Eoin Daly, 'Reappraising Judicial Supremacy in the Irish Constitutional Tradition' in Hickey, Cahillane and Gallen (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 40. Daly notes how 'Constitutional Barriers to Reform Are Usually Attributed to the (Usually Unpublished) Advice of the Attorney General'.

[57] Carl O'Brien, 'Lenihan Rules Out "Divisive" Referendum on Gay Marriage' *The Irish Times* (Dublin, 5 December 2007).

[58] See Conor O'Mahony 'Principled Expediency: How the Irish Courts can Compromise on Same-Sex Marriage' (2012) 35 DULJ 199.

[59] Katherine Zappone, 'In Pursuit of Marriage Equality in Ireland: A Narrative and Theoretical Reflection' (2013) 10 The Equal Rights Review 115 <http://www.equalrightstrust.org/ertdocumentbank//ERR10_sp3.pdf> accessed 26 February 2019.

rights. One such measure was legislation to nullify existing upward-only rent review clauses in leases, a phenomenon that had serious negative effects on commercial properties. Legislation to introduce this measure was published, but then abandoned, with the stated reason that the AG had advised that it was unconstitutional.[60] Other measures apparently thwarted by property rights included measures to tackle the growing housing crisis (such as vacant site levies, land-hoarding restrictions, capping mortgage interest rates, eviction protections, and regulation of 'vulture funds'). Alan Kelly, having served as the relevant Minister for much of this period, stated later that many such measures were desired by the government, and were hampered not by political or financial obstacles, but by the Constitution's protection of private property.[61] Of course, it cannot be accurate to say that Article 43 property rights stopped *any* of these measures, as none of them were invalidated by the courts. Instead, the advice of the AG on constitutional property rights was responsible for the failure to enact these policies. The AG's advice on many or all of these points was contested[62]; property rights can be highly qualified, and nothing in the case law of the superior courts in this era suggested that courts did not take the common good interests in tackling the financial crisis seriously.[63] Commenting on this case law, the editors of *Kelly: The Irish Constitution* note in the preface to the recent edition that 'considerable latitude is given the Oireachtas to regulate and organise a modern economy. The popular conception to the contrary is a pure myth.'[64] It can thus be argued that the AG was giving advice that was highly cautious and conservative, or that the government was presenting it in an overly cautious manner. However, as the advice was not published, the cogency of the AG's reasoning – or how the government portrayed the AG's reasoning – cannot be assessed.

---

[60] Minister for State Michael Ring TD stated that 'points of conflict with the Constitution were identified during the development of that legislation and on the advice of the Attorney General it was not possible to proceed with it'. See <http://www.justice.ie/en/JELR/Pages/SP13000346>.

[61] Kitty Holland, 'Kelly Says Constitution Blocked Attempts to Tackle Housing Crisis' *The Irish Times* (Dublin, 31 March 2016).

[62] See Edmund Honohan, 'Open Letter to Alan Kelly – "Don't Blame the Housing Crisis on the Constitution"' *Irish Independent* (Dublin, 3 April 2016).

[63] Severe restrictions on property rights were taken to alleviate the problems the country faced during this period, including through the National Asset Management Agency Act 2009 and Financial Emergency Measures in the Public Interest Act 2009. None of these provisions were invalidated despite their stringent nature. Relevant cases include *Unite the Union v Minister for Finance* [2010] IEHC 354, *JJ Haire Ltd v Minister for Health and Children* [2009] IEHC 562 and *Dowling and Minister for Finance* [2018] IECA 300. See also Hogan et al (n 6) [7.8.78]–[7.8.166].

[64] Hogan et al (n 6) xvii.

On several occasions during the same period, the government was called to allow an exception to Ireland's strict abortion regime for fatal foetal abnormalities. Again, the AG advised that this would be unconstitutional by virtue of Article 40.3.3. This advice was explicitly relied upon for not including this ground in the Protection of Life During Pregnancy Act 2013,[65] and for later voting down a private member's bills in 2015 that would have allowed for it.[66] On both occasions, members of the Labour Party who had campaigned on liberalising Ireland's abortion regime were whipped to vote against the bill based on this advice.[67] On that occasion, a minster went so far as to suggest that the government *could not* introduce any legislation if the AG had advised that it was unconstitutional.[68] In 2016 the current minority government relied on the same advice to vote down a similar private member's bill. The advice may have been sound, but given the vagueness of the Irish constitutional text, it was probably arguable. Again, given that the substance of the advice was not disclosed it was impossible for parliamentarians to scrutinise the persuasiveness of the AG's reasoning.

Another high-profile example came in 2018, when the amendment Bill to remove the Eighth Amendment from the Constitution was put forward. Serious differences emerged between the Citizen's Assembly and the Eighth Amendment Committee (as well as different advocacy groups) over whether or not the provision should be repealed or replaced. The Citizens' Assembly's substantive recommendation – following the advice of an eminent Senior Counsel – was that Article 40.3.3 should be replaced with a constitutional provision which enabled the Oireachtas to legislate on these issues and any attendant rights. The Oireachtas Joint-Committee on the Eighth

---

[65] See Speech by the Minister for Justice, Equality and Defence, Alan Shatter, TD, during the debate on the Protection of Life During Pregnancy Bill 2013: Report Stage – 10/11 July 2013 <*http://www.justice.ie/en/JELR/Pages/SP13000294*> accessed 26 February 2019.

[66] Independent TD Clare Daly's Bill would have allowed for abortion in cases of fatal foetal abnormality. Resisting opposition calls to disclose the legal basis for the government's opposition to the bill, *The Irish Times* reported that Taoiseach Enda Kenny 'ruled out accepting the legislation, having received an opinion from Attorney General Máire Whelan that it was unconstitutional. He said the AG's advice would not be published, in line with precedent': Michael O'Regan, 'Government Defeats Daly's Abortion Bill with Big Majority' *The Irish Times* (Dublin, 10 February 2015).

[67] Lucinda Creighton, 'Why an Attorney General's Advice Should Be Public: Opinion Governments Should Not Use Secret Legal Advice as an Excuse for Policy U-Turns' *The Irish Times* (Dublin, 6 April 2015).

[68] Then Minister for Transport Leo Varadkar TD bluntly stated that the bill was 'unconstitutional in the view of the Attorney General, and for those reasons we will not support this Bill': Dáil Deb 6 February 2015 vol 866 no 4.

Amendment advocated for simple repeal, arguing repeal was sufficiently certain and no replacement was necessary.[69]

Faced with a politically contentious choice, the Minister for Health sought the advice of the AG on the potential legal and constitutional implications of a simple repeal. The AG advised that if Article 40.3.3 were simply repealed, it might subsequently be argued before the courts that the unborn have residual rights arising under other Articles of the Constitution that could continue to restrict the power of the Oireachtas to legislate on the issue. Therefore, wording should be inserted expressly affirming the right of the Oireachtas to legislate for the regulation of termination of pregnancy, but not exclude judicial review, which the Committee had objected to. On foot of this advice, the government settled on a wording: 'Provision may be made by law for regulation of termination of a pregnancy.'[70] Following calls to publish the AG's advice, a summary of the AG's advice was published. The Taoiseach defended the decision to publish a summary as more than sufficient, and fully endorsed the constitutional reasoning of the AG, explicitly linking it to the government's decision to adopt the enabling clause wording contrary to the recommendation of the Oireachtas Committee.[71] Members of the Committee argued the clause was simply unnecessary and could lead to unexpected results.[72] Others argued an enabling clause went against the spirit of the separation of powers.[73] Merits of the advice aside, the episode represented another example of the government explicitly linking a contentious political decision to contestable AG's advice.

The implications of this reality on the Irish political system are clearly significant, but their true nature is difficult to make out. This is because there are several major unanswered questions about the reality of the AG's role.

---

[69] See David Kenny, 'Abortion, the Irish Constitution, and Constitutional Change' (2018) 5 Revista de Investigacoes Constitucionais 257.
[70] 36th Amendment to the Constitution Bill 2018.
[71] Dáil Deb 30 January 2018, vol 964, no 4.
[72] Lisa Chambers TD opined that 'Our legal advice was that repeal simpliciter was the best option … If the government adopts a different position now, it needs to explain very clearly why': Justine McCarthy, 'Fine Gael at Odds over Legal Advice on Abortion Poll: Government Divided over Abortion Poll' *Sunday Times* (London, 21 January 2018).
[73] ibid.

Is the AG's Advice Truly Independent?

The AG is regarded as being 'in no way the servant of government but is put into an independent position'.[74] However, scepticism has been voiced about the nature of this independence.[75] McCarthy J in the Supreme Court noted that the AG is appointed and terminated by the Taoiseach, and so 'must be presumed to be acting with at least the tacit consent of the Government'.[76] Casey notes the 'peculiar – even anomalous' position of the AG as being outside of government but being 'quasi-ministerial'. The post is similar to members of government in many respects, with practice diluting the division between the role of AG and Minister that the Constitution purports to establish, making it 'almost invisible'.[77] Bradley similarly called the AG a political creature, noting that distinguishing the political from the legal in the AG's work is close to impossible.[78] Simply put, the close relationship and inescapably political nature of the office can 'fuel suspicion' of the AG acting in a partisan or partial way.[79] The AG's advice could be in some sense partisan, presenting ambiguous legal sources in a manner most favourable to the executive's policy preferences. But even those who do not doubt the impartiality of the AG's advice could suspect the impartiality of the government's description of it. For example, the AG's advice could be portrayed by the government in a manner most politically convenient to it, relying on the secrecy of the process to cloak this.

There have been several occasions where the independence of the office has been implicitly relied upon to bolster the status of the AG's advice, where the advice had particular political salience for the government.[80] In 1989, when then Taoiseach Charles Haughey was not able to secure the support of a majority of the Dáil, he declined to immediately dissolve the House and hold another election, as his opponents claimed the Constitution required him to do.[81] Haughey claimed that the

[74] *McLoughlin v Minister for Social Welfare* [1958] IR 1, 17.
[75] See David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell 1996) 267.
[76] *Attorney General v Hamilton* [1993] 2 IR 250, 282.
[77] Casey (n 5) 56–57.
[78] Conleth Bradley, 'The "Political" Role of the Attorney General?' (2001) 6(8) The Bar Review 486, 487.
[79] Casey (n 5) 65.
[80] Gwynn Morgan (n 75) 201.
[81] See Art 28.10. See generally Gerard Hogan, 'Legal and Constitutional Issues Arising from the 1989 General Election' (1989) 24(2) Irish Jurist 157–81.

Constitution's requirement a Taoiseach 'shall resign from office upon his ceasing to retain the support of a majority in Dáil Éireann' meant he had to resign within a reasonable time, which he interpreted as meaning within a few days. The opposition disagreed and argued that the Constitution required a resignation a few hours after a Taoiseach ceased to retain majority support. In favour of his view – that the Constitution only required him to resign after a few days – he cited the advice of AG John Murray. The implication was that the AG was an independent, non-partisan actor, whose advice would be uninfluenced by government or political expediency. Members of the opposition asked to see the advice of the AG.[82] With the opposition dissatisfied and armed with contrary advice, the Taoiseach, though insisting his advice was correct but concerned about public perception, resigned.

In 1995, during a contentious referendum on the topic of divorce, then Taoiseach John Bruton published the AG's advice on proposed legislation that would follow the referendum if successful in order to rebut claims from opponents that the legislation would be inadequate. Again, the assumption must have been that the AG would offer entirely disinterested advice and could not be subject to any political bias.[83]

Another controversial instance occurred in 1992 when AG Harry Whelehan sought an order restraining the Beef Tribunal from questioning a former Minister about what happened at a particular government meeting. The Supreme Court in *Attorney General v Hamilton* upheld the AG's submission that such discussions gave rise to absolute confidentiality.[84] Finlay CJ stated that in such instances the Attorney 'must have the clearest possible duty to intervene on his own behalf, as Attorney General, to protect that right [of cabinet confidentiality]' and restrain breach of the principle.[85] However, as Hogan notes, how the AG subsequently enforced this convention – one he was willing to fight for in the courts – gave rise to 'remarkable anomalies and

[82] Dáil Deb 29 June 1989, vol 391 no 1.
[83] Gwynn Morgan (n 75) 201. See, outside the context of legal advice, further controversies about the AG having a neutral role in politically sensitive extraditions and in matters concerning tribunals that were of political salience to the government: Casey (n 5) 60–65.
[84] *Attorney General v Hamilton* [1993] 2 IR 250.
[85] ibid.

incongruities'.[86] For example, on several occasions the AG failed to take any steps to prevent members of the cabinet from breaking confidentiality when it suited them. This episode sparked the perception that the AG's action in invoking cabinet confidentiality during the tribunal was opportunistic and coloured by political considerations.[87]

Casey in his landmark work on the AG's office acknowledged the criticism that the AG is in some ways a creature of politics rather than a truly independent officer, and argued that it could not be otherwise since the AG and government must work together closely, and it makes sense that they would share similar outlooks.[88] Ultimately, the level of secrecy permeating the AG's legal advice makes it difficult to assess the nature of the advice and the extent to which it might be coloured by political considerations.

Is the Government Bound by the AG's advice?

In recent years, the impression has been given by various governments that legislation cannot be passed if the AG has advised that it may be unconstitutional. It seems, therefore, that the work of the AG clearly operates as a constraint on government and the effective scope of its authority. Some proposals the government wishes to pursue will be amended or discarded to comply with the AG's recommendations on legality and constitutionality.

A recent example came with the news liquidators of Anglo Irish Bank's successor, Irish Bank Resolution Corporation, would honour repayments to holders of around €270 million of junior, or subordinated, bonds sold by Anglo before its nationalisation during the financial crisis. This news came as a surprise, due to repeated assurances by the Irish Government during the Fine Gael/Labour coalition that they would not be paid.[89] The apparent basis for this policy change was that the AG had advised the

[86] Gerard Hogan, 'Review of James Casey, the Irish Law Officers: Roles and Responsibilities of the Attorney General and The Director of Public Prosecutions' (1996) 18 DULJ 211, 212–13.
[87] Casey (n 5).
[88] Casey (n 5) 58.
[89] Joe Brennan, 'Repayment to Junior Anglo Bondholders Unpreventable, Said AG' *The Irish Times* (Dublin, 19 December 2018).

Department of Finance that any move not to pay the subordinated bondholders would not withstand a constitutional challenge. The AG advised such a move would be an unjustified interference with property rights.[90] While we are unable to assess the cogency of the AG's advice, the advice is starkly contrary to that provided by a former AG during the financial crisis – that losses could be imposed on junior *and* senior bondholders – underscores the flexibility inherent in such constitutional questions.[91] However, in this instance it appears the AG gave their view and for all intents and purposes ended debate on this politically charged issue.

In a revealing exchange in late 2019, Taoiseach Leo Varadkar told the Dáil that he could not issue a 'money message' for a private members bill pursuant to Article 17.2., if he was advised by the AG the bill would be unconstitutional, or contrary to European law or any international treaties Ireland is party to.[92] If this statement accurately reflects government practice (and there is no reason to suggest otherwise) then it appears recent executive actors have been interpreting Article 17.2. in a very expansive manner based on AG's advice. This interpretation effectively provides the AG with a veto authority over which private members bills receive a money message, and thus continue to proceed through the legislative process. This interpretation, and the authority it vests in the AG, is striking because it is clearly beyond the textual scope, or purpose of Article 17.2. This provision was intended to prevent the Oireachtas enacting bills of significant financial consequence for the State, without first receiving executive consent. The provision was never intended to vest a generic veto power over the legislative activity of the Oireachtas in the AG.[93]

This kind of influence over government has led commentators to conclude that the AG is clearly amongst 'the most influential of all those who sit around the cabinet table', with influence that permeates the legal system.[94] But if the government really

[90] ibid.
[91] Then AG Paul Gallagher SC 'confirmed repeatedly' that the 'only obstacle to imposing losses on senior unsecured bondholders was obtaining troika approval, not any legal issue'. Peter O'Dwyer, 'Irish Taxpayers Could Have Been Spared €14bn' *Irish Examiner* (Cork, July 2015).
[92] Dáil deb 4 December 2019 vol 990 no 5.
[93] *See* Eoin Daly and David Kenny, 'Government Blocking of Legislation Is Constitutionally Dubious' *The Irish Times* (Dublin, 14 June 2019).
[94] Bradley (n 78) 486. Broader influence on policy is quite possible: Casey (n 5) 55 notes how different attorneys took very different views on whether they had to stick to legal matters or could weigh in on broader topics.

believes it is entirely *bound* by the AG's advice, it is incorrect. The AG's advice is just that: advice. Nothing in the Constitution suggests that the advice of the AG can fetter government action in this manner. As Casey puts it, 'government can hardly be *obliged* to accept the AG's advice on any matter, though to do so would appear to be the normal course'.[95] There may be good prudential or political reasons to follow the advice in most or all circumstances. The AG is probably right in most cases, and failure to follow the AG's clear advice on a major matter might lead to the resignation of the AG, with potential political consequences that the government might dislike. But that is very different from the government being formally bound by the advice. There is no constitutional basis for the government ceding all judgment on constitutional questions to the AG.

A very rare instance of a member of government disagreeing with the AG's constitutional advice in favour of their own *bona fide* view came in late 2019. The AG apparently strongly advised core aspects of Minister Katharine Zappone's policy proposals concerning the disclosure of birth information for adopted persons were constitutionally impermissible. Rather than accede to the advice, Minister Zappone engaged in several rounds of correspondence with the AG defending the constitutionality of her proposals, citing the contrary advice of constitutional lawyers the Minister had liaised with 'who offered … another way to interpret the Constitution'. In the end, however, the Minister reported that the AG declined to change his view, and the Minister did not pursue the policy as proposed, but reached some compromise that complied with the AG's view of constitutionality.[96] Whether this is a relatively isolated incident or a common mode of interaction with the AG is not clear. It is also noteworthy that the AG's view seems to have prevailed.

Use of AG's Advice to Bolster Executive Power?

We have assumed the actors in Ireland's system of executive review act in good faith and believe in their articulated reasons for acting in certain ways. But one cannot rule out the possibility that the executive can cynically use AGs' advice as a rhetorical tool

[95] Casey (n 5) 134.
[96] Jennifer Bray, 'Way Cleared for Law Releasing Birth Data to Adopted People' *The Irish Times* (Dublin, 5 November 2019).

to shore up its political credibility. Rather than sincerely cleaving to the advice and taking the advice as a serious injunction to action, the Government may also claim to be bound by advice that they should not act, when in fact they merely do not want to act.

There are potential strong incentives for the executive to do this. Apparently binding oneself to legal advice provides government with a form of legalistic credibility, a form of reputation-building using the institutions of formal legal analysis. Systemic review of all substantive government policy initiatives by the AG can be regarded as a form of institutional signalling by the executive – to the electorate, elites, civil society, and political opponents – that it is willing to bind itself to ensure compliance with constitutional commitments. In political systems like Ireland, which take legality very seriously and often seem to privilege legalistic reasoning, this is a powerful tool to maintain credibility for the executive as a well-motivated user of discretionary power. Imposing this kind of self-binding institutional structure constitutes a signal, to other political actors and the public, that the government acts in accordance with law and is willing to sacrifice valuable political discretion to do so.[97]

While signalling one's *ex-ante* commitment to bind oneself to AGs' advice narrows discretion at an individual level – as it involves accepting that occasionally a policy option will be off the table – it offers the prospect of gaining political credibility at a wholesale institutional level, which can protect political judgments and agendas from constitutionally based critiques.[98] This means that political opponents or the electorate cannot as easily attack policy on constitutional grounds, given the perception that it has undergone robust and detached scrutiny for compliance with constitutional norms. Underpinning this entire conception is buy-in from Irish political and legal culture that constitutional law largely represents a body of expert technical knowledge, and is the preserve of lawyers and judges.[99]

[97] See generally Adrian Vermuele and Eric A Posner, 'The Credible Executive' (2007) 74 University of Chicago Law Review 865.
[98] See Daphna Reena, 'The Law Presidents Make' (2017) 103 Virginia Law Review 805, 810.
[99] For an account of this problem and a criticism of it, see Conor Casey, 'The Constitution Outside the Courts: The Case for Parliamentary Involvement in Constitutional Review' (2019) 61 Irish Jurist 36; Daly (n 56).

However, in practice, advice given by the AG is likely to be highly qualified,[100] due to the nature of constitutional law and fact that there will rarely be very clear and direct guidance from the courts on how new legislative and policy efforts might interact with the Constitution. Despite this, the government often presents the matters as if decided by the AG with clear, unambiguous advice. With the advice kept secret, there is no way of evaluating the claim that the AG's advice is or should be the decisive factor.

This problem could arise either because the AG's advice is qualified but is put across as clear and certain, or because the AG, due to his or her close relationship with government, could allow the government's agenda and desires to 'unconsciously distort his judgment'.[101] As Casey puts it, 'where a Government, unwilling to take some step urged upon it, seeks to buttress its reluctance by invoking constitutional considerations, the Attorney General may be placed in an invidious position'.[102] Reliance on the AG's advice might shift political blame for inaction from the government to the obstructionist Constitution. While there is no conclusive evidence of this in Ireland, given the structure of the system of advice it is not clear how such evidence would ever become apparent. We can only consider the circumstantial evidence that is available.

An incident illustrating the this risk took place during the presidency of Mary Robinson. In 1993 the government attempted to prevent then President Robinson from co-chairing a commission on United Nations reform. The government claimed that the AG had advised such an appointment was constitutionally barred. In response the President – a former Senior Counsel and legal scholar in her own right – sought independent legal advice, which reached a contrary conclusion. It later transpired that the government's objection was apparently not constitutional, but political: the government did not like the idea of its foreign policy being shadowed by prior presidential endorsement or rejection of certain ideas.[103] The government appeared to be using contestable AG's advice to advance a constitutional objection which masked

[100] Casey (n 5) 119–20.
[101] Casey (n 5) 70.
[102] ibid.
[103] Casey (n 5) 189–90; Gwynn Morgan (n 11) 267.

a political decision. However, as the advice remained confidential this was only possible to ascertain due to government leaks.

More recently, during the term of the last government, the government suggested that removing religious discrimination from school admissions could not be done because the government had been advised that the measure would be unconstitutional. This, it was assumed, meant that the AG had advised this. However, when an NGO published a conflicting legal opinion from three constitutional scholars saying that such a measure likely would be constitutional, it emerged that the government had, in fact, not taken the advice of the AG on the subject.[104] The government did not explain what happened in this instance, but this illustrates how a government might use legal advice as a political tool in a manner not justified by the advice itself. These episodes might suggest the veracity of the allegation, as put by one former Minister, that it is a long-standing political game for the government to refer to AGs' advice in absolute terms to deflect blame for unpalatable political decisions.[105] While none of this proves cynical reliance on AGs' advice, the possibility is often raised and cannot be entirely dismissed. The perception, in this instance, may also be harmful in itself.

Part III: Effect of AGs' Constitutional Review on the Broader Political System

Political Constitutionalism, Parliament, and the Public

As a version of political constitutionalism, Ireland's approach counter-intuitively has the effect of alienating the Constitution from politics rather than increasing political engagement by parliament and the public.[106] Government's apparent self-binding to AGs' advice and unwillingness to take any independent view in effect cedes cabinet judgment on constitutionality to the view of one non-judicial actor. Since legislators do not have ready access to independent legal advice on constitutionality, there is little

[104] RTÉ News, 'Legal Experts Contradict Taoiseach on School Admissions' (Dublin, 22 June 2016). Kenny and Casey (n 4).
[105] Lucinda Creighton, 'Why an Attorney General's Advice Should Be Public' *The Irish Times* (Dublin, 6 April 2015). See 'Child's Play? Máire Whelan Profiled' *Sunday Business Post* (Dublin, 18 November 2012): 'Often, the AG's advice provides political cover for ministers. After all, how often have you heard a minister say: "We have to follow the legal advice given by the Attorney General"?'
[106] Kenny and Casey (n 4).

choice but to accept the AGs' advice.[107] Moreover, save in the case of a minority government, strict use of the parliamentary whip will mean the government's determination (which is apparently the AG's determination) will bind the Oireachtas even though only 15 members of the Oireachtas have access to it.[108]

Since advice is not published or shown to parliamentarians, it goes without saying that the AG's role does not serve *any* function of empowering the Oireachtas to have a better or more effective debate on constitutionality. It is impossible for the Oireachtas to contribute in any meaningful way to a debate about constitutionality. Since the government will tend to simply stand behind the AG's advice and not elaborate upon it or engage with it, this stifles debate on constitutional issues in the Oireachtas and quells a separate culture of parliamentary engagement with constitutional values and rights.[109] This, alongside the reality of executive control of the legislature, means that parliamentary dissent on constitutional questions is rare and usually inconsequential.[110] This form of political constitutional review does not empower the Oireachtas, but disempowers it.

Moreover, it appears – though is difficult to know for certain – that the advice of the AG is largely court-mimicking, focused on the likelihood that a piece of legislation or an executive action would be found to violate the Constitution in a judicial challenge. This is an important and useful function of pre-enactment review, but – particularly when broader debate is shut down rather than started by the advice – this approach means that no culture of political constitutionalism exists, with no independent, institutionally specific viewpoints of the Constitution cultivated by the political branches. This unique constitutional viewpoint is argued to be one of the primary

[107] A recent report on the Office of the Parliamentary Legal Advisor to the Oireachtas, which gives TDs and Senators legal advice, recommended a substantial increase in capacity and budget to help it meet its workload effectively. See Aidan Dunning, *Capacity Review of the Office of the Parliamentary Legal Advisor (OPLA) of the Houses of the Oireachtas* (December 2016).

[108] When minority government, amendments/bills can be carried contrary to AG's advice, but this situation is extraordinarily rare. See Casey (n 5) 125 for the only known example.

[109] Hiebert has noted this risk in Canada when conservative or cautious advice is taken too seriously: Janet Hiebert, *Charter Conflicts: What is Parliament's Role* (McGill-Queen's University Press 2002) 54–55. Foley argues that this executive dominated process might even undermine the rationale for the doctrine of the presumption of constitutionality: Brian Foley, 'Presuming the Legislature Acts Constitutionally: Legislative Process and Constitutional Decision-Making' (2007) 29 DULJ 141, 170–71.

[110] Kenny and Casey (n 4).

virtues of political constitutionalism.[111] The system of AGs' advice stifles dialogue or collaboration (or whatever else you might call it)[112] between courts and the political branches on the boundaries of the Constitution. The political branches are involved only in conforming to the game as played in court.

Relatedly, the public is not given explanations of the advice, but hear that something is unconstitutional and cannot be done with no detailed reasons given. The high level of informational asymmetry between the executive and public on these issues narrows scope for public understanding of the Constitution and constitutionality to develop, such that the public could form a critical understanding of the Constitution and its role. Without developing this critical understanding, engagement in broad public debates about how to navigate constitutional obstacles is stifled. Indeed, if anything, it nurtures a public impression that the Constitution is simply an obstruction to policy-making, with lawyers standing as gatekeepers in respect of policy initiatives. It fosters no image of the Constitution as an empowering document and store of public values which affirmatively empowers politicians and the people to grapple with social and economic problems. It is instead presented as a lofty and opaque barrier to action which only elite lawyers and judges can understand.

Restraining and Empowering the Executive

On the face of it, the process seems to disempower the executive in binding it to the constitutional conclusions of the AG. The AG is a powerful actor in the policy-making process, undoubtedly constraining actions the government may otherwise have pursued.[113] But there is another possibility, noted above: that the executive benefits through this disempowering of the Oireachtas, as it can shut down avenues of parliamentary opposition to its policies, and give some of its action and inaction independent, legalistic justification. It might be that the AG plays a Janus-faced role in respect of executive power: in binding itself to independent advice, the government is both constrained *and* empowered. As noted above, on some occasions this trade-off

[111] See generally Gardbaum (n 3).
[112] See generally Aileen Kavanagh, 'The Lure and Limits of Dialogue' (2016) 66(1) University of Toronto Law Journal 83; Herbert (n 109) 55.
[113] Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) 93–94.

will prevent pursuit of a desired policy. On others, however, it will provide an executive policy with much-needed credibility.

The institutional legitimation that AG scrutiny provides can grant and maintain political credibility on a wholesale level. The intensely secretive nature of the advice-giving shields this process from critique, maximising gains made in terms of political credibility while also potentially giving the executive broad discretion on how to portray the advice. This could help defend increased assertions and delegation of power to the executive, or government inaction over controversial issues. On this view, the structure of the AG's constitutional review would make it a highly useful tool of executive governance and facilitating dominance of the policy-making. It would empower government at least as much as it would bind it.

A remarkable example of the government relying on AG's advice to undergird a controversial executive decision came during the recent 2020 general election.[114] The polling date was set for 8th February 2020, but uncertainty emerged following the sudden death of a candidate in the Tipperary constitutency. Section 62 of the Electoral Act 1992 provides that in such circumstances: "all acts done in connection with the election (other than the nomination of the surviving candidates) are void and that a fresh election will be held". On foot of this provision, the returning officer for the constituency postponed the polling date, and 29th February was suggested as an alternative. However, Article 16. 3.2 of the Constitution states that a general election must be held not later than 30 days after the dissolution of the Dáil. Applying the 1992 Act, and restarting the electoral process in Tipperary, would take the poll outside that time period. Evidently concerned that postponement of the Tipperary poll could leave the whole election open to challenge as a breach of Article 16.3.2, the government issued a "special difficulty order"[115] purporting to suspend operation of s.62 and allow the poll to continue on 8th February 2020. The government justified its decision by

114 We have written about this issue elsewhere, see David Kenny and Conor Casey, 'Legal challenge over Tipperary poll now seems inevitable' *The Irish Times* (Dublin, 6th February, 2020).

115 Department of Housing, Planning and Local Government, **'**Special Difficulty Order **-** Dáil Election in the Tipperary Constituency to be held on 8 February 2020**'** (5th February, 2020) **<** https://www.housing.gov.ie/local-government/voting/dail-elections/special-difficulty-order-dail-election-tipperary-constituency>. Accessed 29th February, 2020.

citing the advice of the AG, who seemingly advised that, contrary to clear legislative provision in s.62, the poll should go ahead on the basis it was unconstitutional having regard to 16.3.2.[116]

Even if s.62 is of dubious constitutionality, the government's actions were an unprecedented exercise of executive authority. It is a bedrock tenent of the Irish constitutional order that the executive cannot suspend a duly enacted statute, whether through its Article 28 executive power,[117] or by relying on a statutory administrative power.[118] The Government and AG are, of course, entitled to hold the view that a given statutory provision is unconstitutional. But the Constitution explicitly vests the power to invalidate unconstitutional laws in the superior courts. Unlike in the United States, where there is interesting debate over whether the president can refuse to execute a statute he considers unconstitutional, such an authority has never been considered a feature of our constitutional Separation of Powers.[119] In order to justify these actions, which involved unusually broad assertions of executive authority, the legitimating quality of AG's advice was critical, and heavily leaned on by the government.[120]

The Judiciary

AGs' review in Ireland also illustrates the ways in which informal or political review can detract from the formal judicial processes of review. When an AG's advice obstructs arguably constitutional legalisation and policy, it is never tested before the courts, either at the pre-enactment or post-enactment stage. Challenging and contested constitutional questions are left unresolved, or rather are resolved extra-judicially by this informal political process that functions somewhat like a one-person

---

116 RTÉ News, 'Tipperary election Candidates withdraw legal action' (6th February, 2020) < https://www.rte.ie/news/election-2020/2020/0206/1113639-election-tipperary-mcgrath/> accessed 29th February, 2020.

117 Conor Casey, 'Underexplored Corners: Inherent Executive Power in the Irish Constitutional Order' (2017) 40 Dublin University Law Journal 1.

118 XXX Kelly's on Henry VIII clauses.

119 For an overview of this debate *see* Saikrishna Prakash, 'The Executive's Duty to Disregard Unconstitutional Laws' (2008) 96 Georgetown Law Journal 1615.

120 Department of Housing, Planning and Local Government, 'Special Difficulty Order - Dáil Election in the Tipperary Constituency to be held on 8 February 2020' (5th February, 2020) < https://www.housing.gov.ie/local-government/voting/dail-elections/special-difficulty-order-dail-election-tipperary-constituency>. Accessed 29th February, 2020.

Supreme Court. This denies us potential clarifications and developments in constitutional law – there has not been a major statement from the Supreme Court on property rights in some years, despite much political concern about the strong effect of these rights – and any possible 'collaboration' between courts and the political branches, such as legislative sequels on controversial issues.[121] Moreover, we are denied the benefit of possibly constitutional policies that the government or the Oireachtas believe to be in the common good.

The increasing reliance on the AG's advice can be contrasted to the marked decline in the use of the Article 26 reference.[122] No such reference has been made since 2005. In the 13 years before that, *seven* such references were made.[123] This has not been for want of any constitutionally controversial legislation.[124] There are several reasons that the procedure may have become disfavoured: it is conducted in the abstract; if approved, legislation is immune from any subsequent review; and it must be conducted in a very short time frame. It may be that case-by-case determinations are thought preferable and the reference procedure is problematic and falling into disuse for good reason. Such an argument must await another occasion.[125] But in the period where this mechanism has fallen into disuse, the prominence of AGs' advice has risen, and it may be that the faith placed in this review has effectively superseded the courts' role in

[121] Doyle (n 113).

[122] See generally Joseph Jaconelli, 'Reference of Bills to the Supreme Court – A Comparative Perspective' (1983) 18 Irish Jurist (NS) 322. It should be noted, in this context, that the Attorney General sits on the Council of State, the consultative body that assists the President in deciding whether or not to invoke Article 26. It is possible that the presidency may be institutionally ill-equipped to effectively second-guess the constitutional assessment of the Office of the Attorney General and its sizeable bureaucratic apparatus.

[123] See Gerard Hogan, David Kenny and Rachael Walsh, 'An Anthology of Declarations of Unconstitutionality' (2015) 54 Irish Jurist (NS) 1, 16.

[124] For example, the Criminal Justice Act 2006, NAMA Act 2009, FEMPI Act 2009 and Protection of Life in Pregnancy Act 2013 and International Protection Act 2015 all attracted intense political debate. Several of these bills were referred to the Council of State, but not referenced. See Sarah Bardon, 'President Refers "Rushed" Asylum Bill to Council of State' *The Irish Times* (Dublin, 23 December 2015).

[125] It could be argued that it would be better if the AG did not let any constitutionally doubtful Bills be passed through the Oireachtas. That is, Bills the AG plausibly suspects may fall foul of constitutional law as articulated in current judicial doctrine. Such a Court-centric approach might prevent a waste of legislative and public attention and resources on Bills which might later be found unconstitutional. While this argument has some merit, we maintain this approach has serious drawbacks. First, it renders Article 26 a dead letter. Secondly, it would guarantee no culture of political constitutionalism could exist or develop, as it would stifle any independent, institutionally specific viewpoints of the Constitution cultivated by the political branches, and any dialogue or collaboration between courts and the political branches on the boundaries of the Constitution. The political branches are involved only in conforming to the game as played in court. It depends, in the end, on one's political disposition. See Hiebert (n 109) 54–55.

screening legislation.[126] It may be that the AG's office has adopted a policy that it will never sign off on the introduction of a Bill unless they are satisfied that it is constitutional. If this is the case, and again it is hard to know given the secrecy surrounding the office, it may detract from the historical purpose of the Article 26 mechanism. There is a good argument the whole point of Article 26 was to enable the Supreme Court to settle what might be regarded as an eminently contestable constitutional question – one which might go either way.[127] In this way, it is possible that executive review, while mimicking and mirroring the judicial method, can possibly erode and detract from the judicial process.

Part IV: The Case for Transparency

There are clearly many virtues of the system of AGs' advice, and it serves a valuable and important role in our system of government. But the account offered here highlights several problems with this system of constitutional advice in Ireland. It is uncodified, its processes are opaque, and its precise consequences are difficult to know. However, we can reasonably comment on several of its more observable effects: it excludes parliamentary and public involvement in debates about constitutional meaning and limits; it seemingly mimics the judicial method, not developing unique political viewpoints on constitutional meaning; and it may detract from the institution of judicial review. It also acts as a block on pursuit of government policy, and a justification for contentious inaction. In this way, it might represent a useful tool of executive governance. In a more critical vein, it is at least possible that it could be subject to misuse by the government.

What is common to all these complaints is that they are either caused by or occluded by the intense secrecy and non-transparency of the process. It is the fact of non-publication of advice that prevents any effective challenge to government reliance on AGs' advice, and any parliamentary or public scrutiny or contribution. And because

[126] We have elsewhere termed this phenomenon 'Shadow Constitutional Review'. In Japan, faith in the Cabinet Legislation Bureau – which provides legal advice to the executive on constitutionality – is so great that its quality is cited as a reason for the exceptional inactivity of the Japanese courts in judicial review of legislation. See Kenny and Casey (n 4).

[127] We are grateful to one of the anonymous reviewers for this point.

there is no detailed knowledge of the advice or the processes around it, we can only speculate on how it is used by government; on how it approaches constitutional questions; on how it effects the development of a political understanding of constitutional law. It is hard to imagine expert advice on any other topic being even close to this consequential, but not being open to public and parliamentary contestation and scrutiny.

This leads to one clear prescription that could begin to address many of these problems while keeping the benefits: increase the transparency in respect of AGs' advice. This could take several forms: the office itself could be more transparent about its processes, methods, and outlooks; and/or the constitutional advice of the AG could be disclosed in some form. The former seems desirable – the intense levels of secrecy do not seem necessary or conducive to good governance – but that recommendation itself would require more knowledge about the role the AG's office plays in departmental policy-making and the way that transparency might change that role or the dynamics of policy-making. An in-depth study involving interviews with current or former AGs and AG office staff might be able to provide this. But the lack of information currently available means that this suggestion must await another occasion. On the other hand, the case for disclosure of advice in some form has, we think, fewer complications and a host of significant benefits. In the wake of moves towards some transparency in Canada,[128] Ireland should follow suit.

The Permissibility of Transparency

The idea that AGs' advice cannot be disclosed is erroneous for several reasons. First, the AG, though sitting at cabinet meetings, is not a member of the government and his or her views are not subject to confidentiality in the way that cabinet members are. Revealing the AG's view does not compromise the collective decision-making of cabinet in the way that disclosure of the views of a particular cabinet member would.

[128] The Minister for Justice (who is also Canada's Attorney General) must now present a 'Charter Statement' with any government bill outlining the Charter of Rights implications of the legislation. These began informally in 2016 and were placed on a legislative footing in 2018; see Bill C–51, An Act to amend the Criminal Code and the Department of Justice Act, amending s 4 of the Department of Justice Act. Such a statement is not the legal advice the Minister provides to the cabinet exactly (though one imagines will follow a similar outline) but rather a statement to inform Parliamentary and public debate on any bill.

Secondly, if disclosing the AG's advice were *per se* a breach of confidentiality – on the theory that the advice influences the thinking of cabinet Ministers – then even the broad nature of the advice should not be revealed. However, as noted above, the broad outline of the advice – that a particular measure was said by the AG to be constitutional or otherwise – is revealed as a matter of course in parliamentary discussion and government communications. This would be just as great a breach of confidentiality as the publication of the detailed advice if this theory were correct, as the influences on cabinet decision-making have been revealed. But the cabinet being influenced to some degree by legal advice does not compromise collective responsibility or the integrity of the discussions at cabinet, and so this argument seems baseless.

Added to this is fact that the advice of the AG *has* been published on several occasions when it suited the government to do so. On at least seven occasions, the AG's advice on constitutional matters has been published. In 1983, in the run-up to a referendum that would ultimately insert a new provision protecting the right to life of the unborn and constitutionally limiting abortion, the advice of the AG on the problematic ambiguousness of proposed referendum language was published in the *Irish Times*, having been released by the Minister for Justice.[129] The government was in this case hoping to secure the support of the opposition for an alternative, simpler wording in light of this advice.[130] Similarly, in the run-up to a referendum on lifting the constitutional ban on divorce in 1995, the AG's advice on the adequacy of the proposed new divorce regime was published by the government to attempt to disarm arguments mounted against the proposal. On various occasions, the government has allowed opposition members to meet with the AG to discuss advice the government was relying on[131]; sent letters of advice to the opposition[132]; read large parts of the AG's detailed advice into the parliamentary record[133]; or provided advice to

[129] 'Attorney-General Rules Out Wording' *The Irish Times* (Dublin, 16 February 1983).
[130] Olivia O'Leary, 'Sutherland Says Wording Might Legalise Abortion' *The Irish Times* (Dublin, 16 February 1983).
[131] Then Taoiseach Charles Haughey allowed opposition leaders to consult the AG directly over dissolution questions: Casey (n 5) 120.
[132] Casey (n 5) 126.
[133] On one occasion the Government rejected opposition amendments to an EU treaty ratification. It justified its actions in part by reading advice supplied by the AG into the parliamentary record: Casey (n 5) 123; Dáil Deb 1986 380 col 2351–52. On another occasion extracts of AG's advice has been given to the Dáil when it wanted to

parliamentary committees.[134] Most recently, in January 2018, a précis of the AG's advice on the constitutional effects of removing/replacing the Eighth Amendment was published.

Arguments against Transparency

It might be argued that there is a tactical disadvantage of publishing advice to cabinet on legislation. We do not uncritically embrace transparency as an unqualified good; it has its benefits and detractions.[135] In this instance, we concede there is undoubtedly a risk greater transparency in respect of AGs' advice may encourage opportunistic litigation to exploit any legal concerns identified.[136]

That said, we do not think this argument is a particularly persuasive objection when subject to scrutiny. First, publishing a summary of an AG's advice does not seem to put the State at a great disadvantage when defending its policies in court. The AG's broad advice (as opposed to say the preparatory materials and detailed opinions of barristers used to formulate the advice, which would not need to be disclosed)[137] is unlikely to be so useful to potential litigants that it would hobble subsequent defence of the legislation, and the sorts of potential objections raised will probably be reasonably apparent to those versed in constitutional law. The fact of the AG expressing reservations about constitutionality would be very unlikely to influence a court in any event, or cause the AG any embarrassment in defending the law's

amend a proposed Bill in a manner the AG thought problematic and the government did not have a majority: Casey (n 5) 125.

[134] Advice has previously been given to the Public Accounts Committee by the AG in respect of a constitutional query it had raised: Casey (n 5) 140.

[135] For an interesting overview of the benefits and detractions of transparency, see David E Pozen, 'Transparency's Ideological Drift' (2018) 128 Yale Law Journal 100–65.

[136] Doyle has suggested that there are 'good reasons not to publish the advice of the Attorney. Given that doubts expressed in such advice would inevitably fuel constitutional challenges to the legislation in question, the prospect of publication might well discourage the Attorney from providing candid advice in writing': Doyle (n 113) 94. We are unsure if there are particularly pressing reasons of public interest not to publish such preparatory material, but recognise that limited disclosure is clearly more likely to be regarded as politically palatable: see Kenny and Casey (n 4); Casey (n 99).

[137] Some might argue that advice should not be disclosed as the most senior private practitioner barristers who advise the AG on constitutional cases would be concerned if their advice to the executive could be subjected to serious public scrutiny. We have little sympathy with this concern. First, there is no necessary reason why the background work of barristers need be disclosed rather than what the AG presents to cabinet on foot of this work, and there is no necessary reason why the identity of such lawyers need be disclosed. But moreover, we see no good reason – principled or prudential – why a lawyer's discomfort about their handiwork being scrutinised should trump the public interest in being able to critically grapple with constitutional advice which will have political consequence for the whole polity. If the advice is consequential, it must be disclosed.

constitutionality against such arguments, which is surely just the job of an advocate. Secondly, even if there is some litigious disadvantage, it is not clear there are strong public-interest reasons that the government should hide constitutional objections to legislations in order to better defend itself in – or avoid – litigation. If publishing constitutional objections results in people taking up those obligations in court, this is hardly an abuse of the constitutional system rather than the system operating in a proper manner. Finally, if this were a real concern, the accounts of the advice given to the Oireachtas could be deemed to not be cognisable in court, but solely for use by the political branches in their internal workings.

The Benefits of Transparency

It would seem that a great many of the problems with the current system could be resolved (or at least be understood) if the government were to publish a précis or summary of the advice of the AG as given to cabinet on any contentious constitutional matter, as was done during recently during the referendum campaign concerning the repeal of Article 40.3.3. This need not involve exhaustive disclosure of all relevant preparatory material, nor disclosure of all advice on any matter engaging constitutional issues. Rather, as a matter of pragmatism it could be reserved for politically contentious issues, where it is most important to involve the Oireachtas and the public in debate, deliberation, and scrutiny. For example, disclosure could be limited to instances where a threshold number of Dáil deputies pass a resolution requesting it. This would be neither unconstitutional nor improper.[138] It would inform legislative debate, enable parliamentary and public scrutiny, and give us a much fuller picture of how this system of advice influences policy-making and is used by government practice, which would inform broader consideration of the impact of the AG.

To attempt to capture some of the advantages of political constitutionalism, it would be worthwhile to also bolster the Oireachtas' ability to scrutinise the AG's advice in cases of disclosure. This might encompass creation of a Constitutional Law Committee

[138] Doyle similarly notes that it 'would be possible for the Attorney to publish a statement of reasons as to why she believes legislation to be constitutional (or not)'. He adds, '[T]hat this does not happen further underscores the dominance by the Government of the legislative process': Doyle (n 113) 94.

specially dedicated and resourced to allow it to offer scrutiny on executive-branch assessment of constitutional issues. This committee would ideally be 'non-partisan in its sense of mission, proportionately represent a range of political parties in the Oireachtas (and thus moral and political viewpoints relevant to constitutional interpretation) and be well-resourced and staffed with its own legal advisors'.[139] It would be able to scrutinise determinations of the executive on constitutional issues and offer its own positions through issuing observations or reports. These observations might then be used as the basis for greater debate during the legislative process.

A renewed focus on open debates about constitutionality could also lead to renewed use of the Article 26 procedure and formal pre-enactment constitutional review. If it did not, this might suggest that reforms of the Article 26 procedure are essential to rejuvenate this atrophying power.[140]

We do not claim that these developments would solve every problem identified here. Parliamentary culture of rights consciousness is hard to develop, and making the executive take seriously other views on constitutionality would not be straightforward. Moreover, as a matter of political culture Irish politicians have long regarded constitutional questions to be the domain of lawyers and judges.[141] There is a risk that promoting greater parliamentary engagement with AGs' advice will not promote anything close to meaningful constitutional deliberation about constitutional issues on the part of legislators. It might cause parliamentarians to engage in doctrinal and legalistic – as opposed to moral and political – assessment of the questions raised by the AG's advice. Instead of promoting a form of constitutional interpretation characterised by rich intermingling of moral and political argument with the open-ended principles and values of the Constitution, it may simply result in speculation

[139] Casey (n 99). An interesting point of future research might also examine the role of the Parliamentary Legal Advisor in advising TDs and Senators on constitutionality in the context of Private Members' Bills.
[140] This immunity from review was introduced in the Second Amendment to the Constitution, in what was perhaps an overreaction by de Valera to the Offences Against the State (Amendment) Bill reference and the rumour that two Supreme Court judges dissented from this position but did not publish dissenting opinions. See Gerard Hogan, 'The Supreme Court and the Reference of the Offences Against the State (Amendment) Bill 1940' (2000) 35 Irish Jurist 238.
[141] See generally Daly (n 56).

by different factions in parliament over how the courts will rule on the issue in contention.[142] In other words, it might cement perception of the Constitution as an obstructionist – as opposed to empowering – document.

However, such pessimism about parliamentary political constitutional is unwarranted at this juncture, and greater openness and transparency over constitutional issues retains several strong normative benefits. If the advice of the AG on contested constitutional matters were a matter of public record, we could at the very least better understand how this advice is formed; what its biases and tendencies are; how the government relies on it; and politicians (and the people) could challenge the way this advice is being used by government if appropriate. It would be a valuable first step towards developing a culture of political constitutionalism beyond the executive and diluting the risk of increasing the power of the executive while undercutting the role and powers of the legislature and the judiciary over constitutional issues. It would also bring some broader accountability to the increasingly powerful role of the AG, which is increasingly becoming a one-person Supreme Court, deciding in advance legislation cannot be proposed because in the 'view of that single individual, it might be unconstitutional'.[143]

A prominent constitutional scholar recently posed the question:

> In a society, where one has a parliament to appraise the policy and performance of the government, ought the parliament not have all the relevant information, unless there is some good reason for non-disclosure, such as security, privacy, decency, or … pending litigation?[144]

Based on the arguments made in this article, we suggest the answer is yes, and we should begin by bringing the constitutional advice of the AG into the light.

---

[142] Rosalind Dixon, 'The Core Case for Weak-Form Judicial Review'(2017) 38 Cardozo Law Review 2193, 2230.
[143] Fintan O'Toole, 'It Is Time to Make AG Answerable for her Actions' *The Irish Times* (Dublin, 10 November 2015). This article also described the AG as one of the 'most powerful and influential people in the State' but also one of the 'least accountable'.
[144] David Gwynn Morgan, 'Could the Dáil ever Find the Government to Be in Contempt?' *The Irish Times* (Dublin, 6 December 2018).